

GERALD W. MARLIN ET AL.

IBLA 86-108, 86-109,  
86-111

Decided June 19, 1987

Appeals from decisions of the Boise District Office, Bureau of Land Management, rejecting desert land entry applications I-7481, I-7482, and I-4213.

Affirmed.

1. Desert Land Entry: Applications--Desert Land Entry: Classification--Desert Land Entry: Lands Subject To--Withdrawals and Reservations: Effect of

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

APPEARANCES: Gerald W. Marlin, Meridian, Idaho, pro se; Deloris B. Marlin, Meridian, Idaho, pro se; Carl D. Qualman, Boise, Idaho, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Gerald W. Marlin, Deloris B. Marlin, and Carl D. Qualman have appealed from individual decisions 1/ of the Boise District Office, Bureau of Land Management (BLM), rejecting the desert land entry application filed by each. 2/ In support of its decision, BLM stated that in November 1980, the Secretary of the Interior issued Public Land Order (PLO) No. 5777 withdrawing the lands sought by appellants from entry under the Desert Land Act, 43 U.S.C. § 321 (1982). This order established the Snake River Birds of Prey Areas. Rejection

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1/ The decisions addressed to appellants Gerald W. Marlin and Carl D. Qualman are each dated Sept. 27, 1985. Deloris B. Marlin's decision is dated Sept. 30, 1985. The individual appeals have been consolidated for decision.

2/ Each application was filed pursuant to the Desert Land Act, 43 U.S.C. § 321 (1982). Gerald Marlin sought lands in E ½ sec. 25, T. 4 S., R. 5 E. Boise Meridian. Deloris Marlin sought lots 2 and 3 and SE ¼, SW ¼ NE ¼, and SE ¼ NW ¼ sec 3, same township. Lands described in Carl Qualman's application fee are lots 2 and 3 and SE ¼ NW ¼ and NE ¼ SW ¼ sec. 7, T. 1 S., R. 1. E., Boise Meridian.

was appropriate, BLM concluded, because regulation 43 CFR 2520.0-8(a) requires that desert land entries be made only on "unreserved, unappropriated" public land.

Appellants Gerald and Deloris Marlin point out on appeal that they each filed their application for desert land entry prior to PLO No. 5777 and that these applications were not acted on for years. They contend that the lands sought by them are in an area that BLM has spent years to work up and classify as suitable for desert land entry. Appellant Qualman asserts that his father, Dallas C. Qualman, has a "common law lien of Indian right of occupancy" on the land described in his application, and states that it is his understanding that this land has never been "ceded or treated, by law or otherwise to the United States of America."

The record reveals that the Marlin's first filed their desert land entry applications on January 7, 1974, and, following a March 15, 1974, notice of deficiency from BLM to each, resubmitted their applications on March 20, 1974. Upon receipt of these supplemented applications, BLM informed the Marlin's that each application described land that had been previously classified as suitable for desert land entry, but that it would be necessary for the Boise District Office to "review the classification to determine if it is still proper." <sup>3/</sup> By memoranda dated March 26, 1974, the Boise District Manager was directed to review the classification and recommend whether the Marlin's application should be approved.

Appellant Qualman's application was initially filed on April 6, 1971, and after amending the description of the lands sought, Qualman resubmitted it on May 24, 1974. The record indicates that the lands described by Qualman in his amended application had been previously classified as suitable for desert land entry. In a memorandum dated August 6, 1974, the Chief, Branch of L&M Operations, directed the Boise District Manager to "review the classification and furnish a recommendation on whether the subject application should be allowed."

From August 1974 until Secretary Andrus issued PLO No. 5777 in November 1980, the Qualman case file shows no activity. During this same period, Gerald Marlin received a cautionary letter from BLM, dated June 6, 1975, advising against removal of vegetation on the lands described in his application. The letter indicates that Marlin's entry was as yet unallowed: "A desert land entry application gives the applicant no right to enter the lands, or disturb it in any way. Until an entry has been allowed the only right an applicant has is the right of precedence over a later desert land applicant." [Emphasis added.]

The above facts describing the progress of the Marlin and Qualman applications are set forth in some detail to ascertain what rights, if any appellants had that might cause their applications to survive the withdrawal of PLO No. 5777. That withdrawal, while describing the lands sought by each appellant, was expressly made subject to valid existing rights.

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<sup>3/</sup> Letters of Mar. 28, 1974

Section 7 of the Act of June 28, 1934, as amended, 43 U.S.C. § 315f (1982), commonly known as the Taylor Grazing Act, authorized the Secretary of the Interior, in his discretion, to examine and classify lands withdrawn or reserved by Exec. Order No. 6910, as amended, or 6964, <sup>4/</sup> "or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses or forage plants, or more valuable or suitable for any other use than for the use provided for under this [Act]." <sup>5/</sup> The Secretary was further authorized "to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public land laws." A proviso to section 7 states:

Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public land laws \* \* \* the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select or locate such lands if opened to entry as herein provided. [Emphasis added.]

Exec. Order No. 6910 temporarily withdrew all vacant, unreserved, and unappropriated public land in Idaho and certain other States from settlement, location, sale, or entry and reserved such lands for classification "pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources." 54 I.D. 539, 540 (1934).

The proviso in section 7 of the Taylor Grazing Act creating a preference right in an applicant was construed by the Department shortly after its enactment. At 54 I.D. 524, 528 (1934), this proviso was explained in the context of a homestead applicant:

When any qualified person files an application in the land office of the proper district to make a homestead entry to any tract not exceeding 320 acres, the Secretary is directed to make a classification of such land. If the Secretary classifies such land as agricultural, the applicant therefor has a preference right to enter such lands when they are opened for entry.

See also 56 I.D. 465, 471, for further explanation following the amendment of section 7 by the Act of June 26, 1936, ch. 842, 49 Stat. 1976.

[1] We hold that a preference right is not a valid existing right that will survive the withdrawal of lands under PLO No. 5777. Our holding is based upon Solicitor's Opinion M-36178, as supplemented on March 4, 1954,

<sup>4/</sup> Exec. Order No. 6964 is set forth in full at 55 I.D. 188 (1935). Exec. Order No. 6910 is set forth in relevant part in the text, *infra*, and the full text of the original order appears at 54 I.D. 539 (1934).

<sup>5/</sup> The Act referred to is found at 43 U.S.C. § 315 through 315r (1982).

61 I.D. 270, 278 (1954). Solicitor's Opinion M-36178 (Supp.) considered whether the holder of a preference right to enter land that had been classified and opened to entry as a result of the holder's efforts had initiated "prior rights" in the land sufficient to defeat a subsequently filed State exchange application. <sup>6/</sup> The Solicitor held that if the application to enter had not been allowed, lands selected by the State were available for acquisition by the State. The Solicitor's reasoning is set forth in the context of a homestead application:

This is so because an application to enter land subject to classification under section 7 confers no right in the land upon the applicant. It merely gives the applicant a preference right to enter the land if it is opened to entry as the result of his application. Thus, if a State's application under section 8 were filed after the receipt of an application under section 7 to enter lands under the homestead laws and after the lands were classified pursuant to the homestead application, but before the allowance of the entry, the State's application could not properly be rejected merely because of that classification. Until the application to enter has been allowed, no rights have been initiated in the lands which could defeat the State's application. The Secretary would be compelled in such a situation, under the mandatory language of section 8(c), to allow the State's application, if the State otherwise met the requirement of section 8.

I conclude, therefore, that the Secretary does not have authority to reject a State's application to exchange lands under section 8(c) of the Taylor Grazing Act, as amended, merely because the lands may have been classified under section 7 of the act prior to the filing of the State's application, and that until rights have been initiated in the classified land by the allowance of a preference right application under section 7 or, following the opening of classified lands, by the entry on the opened land by qualified applicants, any such classification which may have been assigned to the lands selected by a State for exchange purposes must be disregarded in considering the State's exchange application.

Here, had appellants' entries been allowed, Solicitor's Opinion — 36178 (Supp.) would call for reversal of the decisions on appeal. However, the record shows that BLM had not allowed the entry of any appellant when PLO No. 5777 issued. <sup>7/</sup> Appellants did not, therefore, have valid existing

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<sup>6/</sup> The State exchange application had been filed pursuant to section 8(c) of the Act of June 28, 1934, supra, repealed by the Federal Land Policy and Management Act of 1976, § 705(a), 90 Stat. 2792. Solicitor's Opinion M-361798 states that the Department has construed section 8(c) as requiring the consummation of State Exchanges, where the State has met the other requirements of the section. 61 I.D. 270, 274 (1954).

<sup>7/</sup> In his statement of reasons, Gerald Marlin states: "Land is not in

rights that would survive this withdrawal. The BLM decisions are in accordance with Solicitor's Opinion M-36178 (Supp.) and must be affirmed. See also Fred Bartine, 59 I.D. 110, 121 (1945) (Bartine's actual possession and reclamation of lands prior to a withdrawal were necessary to except such lands from the withdrawal).

Although the above analysis is fully applicable to appellant Qualman, we note that even if the argument posed by Qualman in his statement of reasons is based in fact, i.e., that the lands sought by him are not public domain, BLM's rejection of his application is, nevertheless, correct, albeit for different reasons. Any desert land application for private lands must necessarily be rejected because BLM has no jurisdiction over such lands.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Boise District Office are affirmed.

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John H. Kelly  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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Kathryn A. Lynn  
Administrative Judge  
Alternate Member

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fn. 7 (continued)  
natural state. It was cleared by previous applicant who was given permission to bring land to patent but dropped claim before bringing it to completion." If the "previous applicant" mentioned by appellant earned a preference right to enter the lands now sought by Gerald Marlin, the next applicant was authorized to succeed to this right. See 43 CFR 2450.8. However, even if Marlin did, in fact, succeed to this preference right, such right is not equivalent to an allowed entry.